

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT TACOMA

VIVIAN FISHER, individually and as  
Personal Representative of the Estate of  
HOWARD LEROY FISHER, deceased, et  
al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

CASE NO. C09-5146BHS

ORDER DENYING  
DEFENDANT'S MOTION FOR  
LEAVE TO SUBMIT  
ADDITIONAL ARGUMENT  
AND MOTION FOR  
RECONSIDERATION

This matter comes before the Court on Defendant United States of America's ("Government") motion for leave to submit additional argument (Dkt. 58) and motion for reconsideration (Dkt. 61) of the Court's order granting Plaintiff's motion to exclude expert testimony (Dkt. 57). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby denies the Government's motions for the reasons stated herein.

**I. FACTUAL AND PROCEDURAL HISTORY**

For a more complete factual background, see the Court's findings of fact and conclusions of law and order (Dkt. 60). At the conclusion of the bench trial held in this action the Court asked the parties to submit additional briefing regarding jury verdicts and awards in cases similar to this one. Dkt. 49. The parties submitted simultaneous briefing

1 on the issue on September 24, 2010. Dkts. 53 & 54. On September 30, 2010, the  
2 Government submitted a motion for leave to submit additional argument in response to  
3 Plaintiffs' briefing on jury verdicts and awards. Dkt. 58. On October 1, 2010, counsel  
4 for Plaintiffs filed a response in opposition to the Government's motion for leave. Dkt.  
5 59. Also on October 1, 2010, the Court issued its findings of fact and conclusions of law  
6 and order awarding damages to Plaintiffs in the amount of \$1.9 million. Dkt. 60. On  
7 October 13, 2010, the Government replied to Plaintiffs' response to the motion for leave.  
8 Dkt. 62.

9 On September 28, 2010, the Court issued an order granting Plaintiffs' motion to  
10 exclude the testimony of the Government's expert witness Dr. Scott Kush. Dkt. 57. On  
11 October 12, 2010, the Government filed a motion for reconsideration of the Court's order  
12 granting Plaintiffs' motion to exclude. Dkt. 61.

## 13 II. DISCUSSION

### 14 A. Motion for Leave to Submit Additional Argument

15 At the conclusion of the trial in this action on September 15, 2010, the Court  
16 ordered the parties to file additional briefing and examples of awards and jury verdicts  
17 rendered in similar cases. *See* Dkt. 49. The Court intentionally requested that the parties  
18 submit their briefing simultaneously and took into account the arguments made by both  
19 parties in its order awarding damages. *See* Dkt. 60. Therefore, the Court concludes that  
20 the Government is not entitled to additional argument regarding the awards and jury  
21 verdicts submitted by Plaintiffs and denies its motion for leave to submit additional  
22 argument.

### 23 B. Motion for Reconsideration

24 Motions for reconsideration are governed by Local Rule CR 7(h), which provides  
25 as follows:

26 Motions for reconsideration are disfavored. The court will ordinarily  
27 deny such motions in the absence of a showing of manifest error in the prior  
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1 ruling or a showing of new facts or legal authority which could not have  
2 been brought to its attention earlier with reasonable diligence.

3 Local Rule CR 7(h)(1).


4 The Court's order granting Plaintiffs' motion to exclude the expert testimony of  
5 Dr. Scott Kush does not represent manifest error. The Court also concludes that the  
6 Government's motion for reconsideration effectively restates the same arguments made in  
7 bringing its response to Plaintiffs' motion to exclude with the exception of the additional  
8 declarations of medical doctors commenting on the issue of Dr. Kush's methodology  
9 being generally accepted in the scientific community. Dkt. 61. However, the  
10 Government fails to present new facts or legal authority that could not have been brought  
11 to the Court's attention prior to this motion.

12 Because the Government has not adequately met its burden under CR 7(h)(1), the  
13 Court denies its motion for reconsideration.

### 14 **III. ORDER**

15 Therefore, it is hereby **ORDERED** that the Government's motion for leave to filed  
16 additional argument (Dkt. 58) and motion for reconsideration (Dkt. 61) are **DENIED** for  
17 the reasons stated herein.

18 DATED this 26th day of October 2010.

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21 BENJAMIN H. SETTLE  
22 United States District Judge  
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